[APPELLATE CIVIL JURISDICTION]
TERRELL, Ag. C.J.
September 28, 1933.

CHONG HIN.....Appellant

v.

YAP SIN YEE Respondent

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 27 of 1933]

Land Code 1926, ss.138, 141, 149,—Notice to Chargor—Waiver of irregularity.

Under a charge dated 17th July, 1931 the payment of $5,000 was secured. The charge provided for repayment by twenty instalments each of $250 with interest. The first of such instalments was payable on 17th August, 1931 and in respect of this the chargor defaulted.

The charge contained no provision to the effect that on default in paying any instalment the whole principal should become due and payable.

The chargee gave notice in writing on 27th October, 1931 calling on him to pay "the principal sum of $5,000 and interest due" on the charge.

Held that, although the notice was bad inasmuch as the whole principal of $5,000 was not at that time due, as the chargor appeared at the hearing before the Collector and raised no objection to the form of the notice, the irregularity had been waived and the Collector was not deprived of jurisdiction.

Lau Yau Weng v. *Bank of Malaya*, (1931-1932) F.M.S.L.R. followed.

Morrison for Appellant.

W. G. W. Hastings for Respondent.

Cur. Ad. Vult.

TERRELL, AG. C. J.—This was an appeal against the order of an Assistant Collector of Land Revenue directing that certain mining land be sold by auction to recover $5,000 principal and $1,725 for interest. The order was dated the 19th June, 1933. The charge was dated the 17th July, 1931, and provided for the payment of the $5,000 by twenty instalments of $250 the first of such instalments being payable with interest on the 17th August, 1931. The chargor defaulted with payment of the first instalment, and on the 27th October, 1931 the chargee served a notice calling upon the chargor 'to pay the principal sum of $5,000 and interest due' on the charge. The notice did not specify a time for payment, and there was no provision in the charge that default in paying any instalment made the whole principal due and payable.

Section 133(i) of the Land Code provides that

> "if default is made in the payment of the.... periodical payment.....secured by a charge"

the chargee may give the chargor notice in writing

> "to pay within a time to be specified in the notice, but not less than 30 days, the money *due and owing* on such charge."

I have no doubt that the notice did not comply with Section 133(i). There can be no question that no time for payment was specified, and although the $5,000 was certainly owing, it was not 'due and owing' as only one instalment was in fact 'due and owing.'

No objection was, however, taken to the form of the notice before the Collector, and unless the defect in the notice deprived the Collector of jurisdiction, it is quite clear that any technical defect in the form of the notice would not vitiate the proceedings—*S. R. M. M. A. Supramanian Chetty* v. *S. P. Mohamed Ibrahim*, 3 F.M.S.L.R. 91, and *Lau Yau Weng and others* v. *The Bank of Malaya Ltd.*, (1931-1932) F.M.S.L.R.

It was argued, however, that under section 141(ii) the Collector has no jurisdiction unless the notice is in proper form. The sub-section reads:

> "Thereupon the Collector, if he is satisfied that notice has been given as above provided, shall fix a day and hour and place etc."

The Collector was satisfied because the chargor appeared and raised no objection to the form of the notice.

If the deficiency in the notice deprives the Collector of jurisdiction under section 141 in the case of land held under entry in the Mukim Register, it is clear that such deficiency would also deprive the Court of jurisdiction under section 149 in the case of land held under certificate of title. Under section 149 the jurisdiction of the Court arises when the chargee has given the chargor a notice under section 138, default has been made, and the chargor has been summoned before the Court to show cause why the land should not be sold. Thereupon 'if no cause is shown to the satisfaction of the Court' a sale is ordered. If a valid notice is a condition precedent in the one case it is in the other, but in the two cases cited though the point was not argued, it is clear that the notices were not in the proper form, and that the Court notwithstanding had jurisdiction.

I think, therefore, that the argument as to jurisdiction fails and that the irregularity in the form of the notice was waived.

As regards the amount due on the charge, I see no reason to differ from the findings of the Collector.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]
MUDIE, J.
November 21, 1933.

SEONG SAM.....Plaintiff

v.

GOON FOOD ON.....Defendant.

[PERAK CIVIL SUIT No. 158 of 1933]

Common Gaming Houses Enactment, 1912—Public Lottery—Contract Enactment, 1899—Wagering Contract—Suit by purchaser of a share in lottery ticket to recover share of the prize—Taint of illegality—Illegal and void contract differentiated.

A purchaser of a share in a ticket in a public lottery is a party to an illegality, and cannot maintain an action based on an agreement as to the disposal of money received as a prize.

Such an agreement is illegal and is to be distinguished from an agreement to dispose op monies which may be received in respect of a prize in a private lottery.

Lim Lian Wah v. *Lee Ah Kiew*, 7 F.M.S.L.R. 66, distinguished.

E. C. Watson for plaintiff.

Haji Abdul Wahab for defendant.

MUDIE, J.—On the 10th August, 1933, the plaintiff paid the sum of $1 to the defendant for a 2/27th share in three tickets taken by the defendant in an Irish Sweepstake. One of the tickets won a prize of £1,453 equivalent to $12,497.11 in Straits Settlements currency. The plaintiff's claim is for $733.14, being the balance due in respect of her share, after allowing for a commission of 10% and a sum of $100 which the defendant says he paid her in full settlement.

The defendant pleads that as the contract is illegal the plaintiff cannot recover.

He relies on section 30(i) of the Contract Enactment, 1899, which reads as follows:—

> "Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made,"

and on the following sections of the Common Gaming Houses Enactment, 1912:

> 2. (i) "In this Enactment unless the context otherwise requires—
>
> 'Lottery ticket' includes any paper or figure or writing or symbol or other article whatsoever which either expressly or tacitly entitles or purports to entitle the holder or any other person to receive any money or money's worth on the happening of any event or contingency connected with any public lottery;"
>
> 7 (i) "Whoever either personally or by an agent pays or deposits any money or money's worth to or with any person concerned in the business of a common gaming house as a stake or for or in respect of any event or contingency connected with a public lottery or buys a lottery ticket shall be punishable with a fine not exceeding twenty-five dollars."
>
> 9. "Every sale or contract for sale of a lottery ticket is hereby declared to be void and no action shall be maintainable by any person in respect of any such sale or contract except by the purchaser for the return of the money or other consideration (if any) paid thereon."

It is admitted by the plaintiff that the Irish Sweepstake is a public lottery.

It is contended for the defence that as it is an offence to buy a lottery ticket, a contract for the purchase of a lottery ticket is illegal, that the plaintiff's contract with the defendant is tainted with illegality, and the plaintiff is precluded from recovering.

The plaintiff's reply to this argument is that though the contract between the defendant and the Irish Sweepstake is illegal, and cannot be sued on, the contract between the plaintiff and the defendant as to the disposal of any monies that may come into the defendant's hands in respect of the lottery tickets is valid and enforceable. A number of authorities are cited in support of this view.

In *Bridger* v. *Savage*, 15 Q.B.D. 365 the plaintiff employed the defendant for a commission to take bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received, it was held that 8 and 9 Vict c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding that statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant.

The following passage occurs in the judgment of Bowen, L. J. at page 367—

> "Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received money which belongs to his principal, and which he received for his principal, and only on that account, should be allowed to say that the payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract, under which the money was paid to him."

A betting contract is void merely, and not illegal. As the buying of a lottery ticket is an offence, a contract for the purchase of a ticket is not merely void but illegal. In my view *Bridger* v. *Savage* is only an authority where the collateral contract is void and not illegal.

Tenant v. *Elliot*. 1 B. & P. 3 and *Beeston* v. *Beeston*, (1875) 1 Ex. D 13 are open to the same criticism.

Other authorities were cited which had reference to collateral transactions which are illegal.

In *Farmer* v. *Russell*, B. & P. 296 there was an illegal contract between the plaintiff and a third person at Portsmouth to deliver certain goods, counterfeit half-pence, to that third person. The defendants were carriers employed by the plaintiff to deliver the goods and to receive the money, which they did. In an action by the plaintiff against the carriers to recover the money it was said that the original contract being illegal they could not be compelled to pay; but it was

decided against them, because the money had been paid over to them at Portsmouth for the plaintiff's use, and it was held that the defendants could not retain the money.

The ground of the decision is that the illegality is entirely outside the contract between the parties, and in no way connected with it.

In *Gordon* v. *Chief Commissioner of Metropolitan Police*, (1910) 2 K.B.D. 1080 where the plaintiff sought to recover from the police money of his which they had seized as being the proceeds of street betting, it was held by the Court of Appeal that though the money had been acquired illegally, the cause of action did not arise out of any illegal transaction and he was entitled to recover.

The same principle appears in *Sharp* v. *Taylor*, 41 E.R. 1153 and other authorities.

The *ratio decidendi* of these cases is that where the illegality is a distinct transaction which has no connection with the cause of action, the plaintiff is entitled to recover.

It may be useful to cite a passage from the judgment of Jessel, M.R., in *Sykes* v. *Beadon* 11 Ch.D. 170 at page 197—"I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the Court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contributions from the person making the profits realized from it.

"It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that that contract was legal, and which belonged to the persons who seek to recover them; but I am bound to say I think there is no pretence for saying that an illegal contract will in any way be enforced or aided by a Court of Law or Equity; and therefore I feel bound to allow this demurrer, which I do, with costs."

The argument founded by the plaintiff on these authorities is that when the plaintiff bought a share in the defendant's tickets, the illegal transaction, namely the purchase of the tickets by the defendant, was concluded, and that her contract for a share of the prizes was in no way connected with it.

I am unable to accept that argument because it seems to me, by buying a share in the defendant's tickets, she is buying a share in the defendant's contract with the Irish Sweepstake, which is an illegal, and not merely a void, contract. She makes herself a party to the illegality, and the Court will not assist her.

The F.M.S. case of *Lim Lian Wah* v. *Lee Ah Kiew*, 7 F.M.S.L.R. 66 was also cited. The facts in that case may be shortly set out as follows: The plaintiff and the defendant were members of the Selangor Turf Club. The plaintiff paid the defendant $20 for an allotment in the name of the defendant of two numbers in the Turf Club Sweepstake. One of the numbers won a prize. The plaintiff successfully sued the defendant for the amount of the prize he recovered from the Turf Club.

The plaintiff relies on the following passage which appears in the Head Note to the case:

> "An agent who has received money to the use of his principal on an illegal contract between him as such agent and a third party cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received."

It is obvious from the cases we have just been discussing that that proposition cannot be accepted as an accurate statement of the law without qualification.

I have perused the judgment of the learned Chief Justice in that case with the greatest care. I can find nothing in it, which lends support to the statement in the Head Note. The words "illegal contract" and "illegality" are nowhere to be found in the judgment.

The decision of the learned judge on this point appears on page 69:

> "The agreement between the 1st defendant and the Selangor Turf Club was void under Section 30 of the Contract Enactment, 1899, being an agreement by way of wager. But this does not prevent the plaintiff from recovering the proceeds of the wager when received by the defendants. See *Bridger* v. *Savage*, (1885) 15 Q.B.D. 363 and *Bhola Nath* v. *Mul Chand*, 25 All. 639."

The learned judge also held that the Selangor Turf Club Sweepstake was not a public lottery.

It is not an offence to buy a ticket in a private lottery. An agreement for the purchase of such a ticket is void under section 30 of the Contract Enactment, 1899, but it is not illegal. An action will not lie to recover the prize money. But an agreement to dispose of monies which may be received in respect of a prize is valid and enforceable.

The Irish sweepstake is a public lottery. To buy a ticket in a public lottery is an offence. An agreement for the purchase of such a ticket is, therefore, illegal, and not merely void. In my opinion an agreement to dispose of monies which may be received in respect of a prize in a public lottery partakes of the illegality which attaches to the agreement to purchase a ticket in the public lottery. By becoming a party to such an agreement, the plaintiff made herself a party to the illegality on which the agreement is founded.

For these reasons I am of opinion that the cause of action arises out of an illegal transaction and the action cannot be maintained.

The suit will be dismissed with costs.

Judgment accordingly.